



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 188 of 2007

SIMON TOWETT MARITIM.....PLAINTIFF
VERSUS
JOTHAM MUIRURI KIBARU.....DEFENDANT

RULING

This is an application brought under sections 3A of the Civil Procedure Act, 27 and 28 of the Limitation of Actions Act and Order 36 rule 3C(2) of the Civil Procedure Rules.

It is an application for leave under the provisions of section 28 aforesaid, brought *ex parte* and ought to have been heard *ex parte* but instead was heard *inter partes*. No prejudice has been caused to the applicant by so hearing the same *inter partes*.

The applicant having filed this suit on 20th August, 2007 against the respondent for damages for conversion must have been alerted by the respondent's defence to the effect that the suit was statutory barred hence this application for leave to consider the suit already filed as having been filed within the prescribed time.

Under Part 111 of the Limitation of Actions Act, time will be extended on three conditions which are well known as listed under A, B and C.

The Application is predicated on C – ignorance of material fact. The applicant has averred that he delayed to file the suit by three weeks; that he only learnt that the cause of action had arisen from his advocates in January, 2007; that the respondents went ahead with execution despite the existence of an order staying such execution. Apart from the fact that the application ought to have been argued *ex parte*, the respondent's replying affidavit has not been attested by a Commissioner for Oaths in violation of the Oaths and Statutory Declaration Act – Cap 15. I am not, for those reasons, obliged to consider the replying affidavit.

Does the applicant deserve or need leave to file the suit against the respondent out of time? According to the applicant, the delay was only for three (3) weeks and therefore not inordinate. He also contends that the fact that an order of stay had been granted in his favour was not within his knowledge until January, 2007.

Starting with the latter, the applicant was all along represented by counsel. He has averred that Kimaru, J in Nakuru H.C.Misc. Application No.172 of 2004 granted an order of stay of execution on 21st October, 2004. Yet what is annexed to the affidavit in support of this application is a ruling in Nakuru H.C.C.C.No.258 of 1996. There is therefore no evidence that when a stay was granted on 21st October, 2004 neither the applicant nor his counsel was present. Furthermore, other than a general statement that he learnt of the stay order in January, 2007, there are no details of how he learnt about the

same. The provisions of Part 111(c) - Ignorance of Material Facts – is not available to the applicant.

The fundamental question however, is whether by bringing the suit on 20th August, 2007, the applicant was time barred. It is common ground that the cause of action arose on 27th July, 2004. The applicant's claim being for damages for conversion, he was required to file the suit, in terms of Section 4(2) of the Limitation of Actions Act, within three years from 27th July, 2004

The plaint herein was filed on 20th August, 2007. In computing time for the purposes of a written law, unless the contrary intention appears, regard must be had to section 57 of the Interpretation and General Provisions Act (Cap 2).

Between 27th July, 2004 (excluding 27th July, 2004) and 20th August, 2007, there are eleven months which constitute what are referred to as excluded days in the Interpretation and General Provisions Act (Saturday, Sunday and public holidays)

Eleven months out of the period in question would bring the suit well within the prescribed period. In the result, the instant application was therefore not necessary had computation of time

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been done in strict compliance with the law. I hold that the suit is properly filed. The application is dismissed. I make no orders as to costs.

Dated, Signed and Delivered at Nakuru this 15th day of January, 2010.

W. OUKO
JUDGE